Supreme Court, U.S.
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92-1626

Case No.

In the Supreme Court of the United States
October Term, 1993

James D. and Sharon A. Ford, PETITIONERS

v.

United States of America
and
Internal Revenue Service

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Internal Revenue Service (IRS) acquires title to personal property levied upon under 26 U.S.C. § 6331 thereby divesting the district courts of jurisdiction to hear quiet title claims against the United States under 28 U.S.C. § 2410, particularly where, as here, the notices of seizure required to given to the owner of the property, as required by 26 U.S.C. § 6335(a), have not been given.

2. Whether 26 U.S.C. § 7852(e) grants jurisdiction to district courts to hear Privacy Act claims of the Internal Revenue Service's failure to maintain accurate, complete, and relevant records used in making an adverse determination to seize an individual's property, or whether such a claim is an improper application of 5 U.S.C. § 552a(g), directly or indirectly, to the determination of the existence or possible existence of liability of any person for any tax.

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OCTOBER TERM, 1993

No.

JAMES D. FORD *and* SHARON A. FORD, PETITIONERS

v.

UNITED STATES OF AMERICA and

INTERNAL REVENUE SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

James D. and Sharon A. Ford, on their own behalf, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a) is not officially reported. The opinion of the district court (App. B, *infra*, 12a) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered December 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of the Internal Revenue Code of 1954 (26 U.S.C.), the Privacy Act of 1974 (5 U.S.C. 552a) and section 2410 of the Judicial Code (28 U.S.C.), are set out in a statutory appendix (App., *infra*, 35a-43a).

STATEMENT

The Internal Revenue Code imposes liability for payment of a number of "employment taxes", including income taxes required to be withheld from employees' wages at the source (I.R.C. § 3403).[1] With the exception of third party lenders,[2] "only 'employers' [are] liable for

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[2] This case does not involve third party lenders.

income ... taxes required to be withheld and deducted from employee wages. *United States v. Jersey Shore State Bank*, 781 F.2d 974, 975-76 (3rd Cir. 1986) *aff'd Jersey Shore State Bank v. United States*, 479 U.S. 442 (1987).

The employer in essence serves as a collection agent for the government with respect to employment taxes. If the employer fails to satisfy its obligations with respect to such taxes, the Code provides several alternatives that the IRS may use to collect such funds which, relevant here, includes collection of such taxes directly from the employer, who is explicitly made liable therefore. (§ 3403). (App., 36a).

The Code also sets forth the procedures the Commissioner must follow before commencing administrative collection action against the person deemed liable for unpaid taxes. The Commissioner must first *determine* liability (§ 6201), (App., 37a) and must then assess the tax by *recording* the liability against the taxpayer.

(§ 6203) (*id*). Once the assessment is made, a notice of assessment and demand for payment must be sent to the taxpayer (§ 6303(a)) (App., 38a), who upon receipt must pay the amount stated in such notice. (§ 6155(a)) (App., 37a).

Thereafter, the Commissioner is authorized to levy upon all property and rights to property belonging to the person liable to pay the tax. (§ 6331(a)) (App., 39a). The date levy is considered made is the date the notice of seizure provided in § 6335(a) is given (§ 6502(b), App., 41a).

A lien in favor of the United States is imposed upon all property or rights to property belonging to "any person liable to pay any tax". (§ 6321), App., 38a). The lien arises at the time of assessment, continues until the liability for the amount so assessed ... is satisfied", (§ 6322), and becomes enforceable if the person liable to pay the tax "neglects or refuses to pay the same after demand" (§ 6321).

Contrary to these Code provisions, here the

IRS labeled petitioner, James Ford (James), who was then an employee, an employer liable for additional employment taxes for the year 1983.[1] Despite James' letters to the IRS' requesting that his employer be included in the audit process seemingly underway, the IRS ignored James' letters and refused to communicate with his employer. Instead, it filed notices of lien alleging that taxes, interest and penalties had been assessed against James for the year 1983 and that a civil penaly had been assessed against him for the year 1986.

In January 1988, the IRS issued notices of levy upon what it suddenly recognized as James' employer, demanding all but $75 of James' take home pay in an effort to satisfy the outstanding liens. The levy resulted in the seizure of $8721.42 of the $23,402.59 lien asserted for the

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[1] Although liability is an issue not to be litigated in a quiet title or Privacy Act suits such as this, some discussion is necessary to illustrate the difficult question this case presents.

year 1983, and seizure of $500 in satisfaction of a civil penalty asserted for the year 1986. A notice of release of lien was filed with respect to the $500 civil penalty, but the lien asserted for the year 1983 remains unreleased. In neither case has the IRS served the notices of seizure required to be served by § 6335(a).

When petitioners completed their review of internal IRS records and discovered that the IRS failed to make the assessments or to send the requisite notices as alleged on the notices of federal tax lien, petitioners filed this quiet title action under 28 U.S.C. § 2410 alleging these procedural defects. 28 U.S.C. § 2410 waives the United States' sovereign immunity to contest procedurally defective tax liens, but does not serve as a waiver to contest the underlying liability. *Arford v. U.S.*, 934 F.2d 229, 232 (9th Cir. 1991). Jurisdiction was invoked pursuant to 28 U.S.C. § 1340.

Because the internal records used by the IRS to make the determination to seize James'

wages contained inaccurate, incomplete and irrelevant information (App., 27a n.4), and because the IRS failed or refused to check the accuracy of the information before issuing the notices of liens and levies (*id* at 28a (n.4 cont.), petioners incorporated an action under the Privacy Act. 5 U.S.C. §§ 552a(g)(1) (C) & (D) and 552a(g)(4) provide district courts jurisdiction to award damages against the United States when an agency fails to maintain adequate records used in making a determination adverse to any person (App., 28a n.5). 26 U.S.C. § 7852(e) prohibits the application of § 552a(g) (5 U.S.C.), to the determination of the existence or possible existence of liability of any person for any tax, interest or penalty. (App., 41a).

The case was submitted to the district court on the petitioners' motion for partial summary judgment on the quiet title and Privacy Act claims (Counts I, II and III) and on cross motions for partial summary judgment (App.,

12a). The district court granted the United States' motion (on Counts I and II) concluding that the United States "had outright ownership and possession" of the property and, therefore, jurisdiction was lacking to hear the quiet title action (App., 23a & 24a).[1]

The district court granted the Internal Revenue Service's motion (on Count III) concluding that petitioners' "Privacy Act claim involves records pertaining to the determination of ... tax liability" (App., 29a) despite the IRS' own admission that the records complained of were not used in the process of determining a liability, but rather, would have been created after a liability determination. Because the district court granted the these motions,

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[1] Although the district court refers to the Certificate of Release of Lien as "evidence" of the United States' ownership of the $500 penalty, (App., 24a) it is unclear what it relied on to find that the United States had ownership of the $8721.42 seized for the year 1983 (App., 25a-26a) since a Certificate of Release has not been filed.

petitioners' summary judgment motion was stricken as moot (App., 33a, ¶ D).

The appellate court affirmed in an unpublished opinion (App., 1a). Apparently rejecting petitioners' argument that they remained the owners of the property by virtue of the IRS' failure to serve the § 6335(a) notices, the Ninth Circuit upheld the district court's conclusion that the United States was the true owner (App., 5a-6a). Based on this conclusion, the court relied on it's decision in *Hughes v. United States*, 953 F.2d 531 (9th Cir. 1992), (barring § 2410 claims relating to previously garnished wages because the government has a title, rather than a lien, interest in such wages) (*Id*), despite petitioners' reliance on Supreme Court decisions contrary to *Hughes*.

Like the district court, the court of appeals misconstrued petitioners' Privacy act claim as one alleging the "dissemination of inaccurate information pertaining to the Fords' tax liability", an allegation the Fords have

never made. (App., 6a-7a). In affirming the district court's determination that it lacked jurisdiction, the appellate court reasoned that claiming "the governments' determination to make a seizure of .. property .. based on inaccurate and inconsistent records" is equivalent to a cliam involving tax liability (App., 7a-8a).

REASONS FOR GRANTING THE PETITION

I. 28 U.S.C. § 2410; Quiet title actions.

a. The court of appeals decision holding jurisdiction lacking to hear petitioners' quiet title action conflicts with this Court's rulings in *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1982), and *United States v. National Bank of Commerce*, 472 U.S. 713 (1985).

In *Whiting Pools*, this Court held, at page 210, that the Code's levy and seizure provisions are special procedural devices which do not transfer ownership of levied upon property to the IRS. The Court found that IRS' interest in seized property remains a lien interest. In it's analysis, the Court noted the wording in §

6335(a) and reasoned that because a notice of seizure must be given to the property owner following the seizure, the person whose property is seized must still *be* the owner following seizure. *Whiting Pools*, at 211 & n.19.

Likewise, in *National Bank*, at page 731, this Court held that an administrative levy does not determine ownership rights to levied upon property. It was the United States itself that told this Court, in it's petition for a writ of certiorari in the *National Bank* case, "[a]lthough a levy does not determine ultimate ownership rights where such rights are in dispute, it does protect the government 'against diversion, loss, or concealment of the property" while the dispute is being resolved."[5]

Here, the appellate court upheld the United States' shift in position relying on it's own

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[5] *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Eight Circuit, No. 84-498, (filed Sept. 27, 1984), page 19 (citing 4 Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 111.5.4, at 111-108).

decision in *Hughes v. United States*, 953 F.2d 531 (9th Cir. 1992). Without indicating whether it reviewed *Whiting Pools* or *National Bank*, as petitioners' requested, it apparently concluded that title to the property vested in the United States when it affirmed the district court's determination that jurisdiction was lacking. We respectfully submit that the Ninth Circuit's nonacquiescence requires this Court's attention.

b. The court of appeals decision also conflicts with the Third Circuit's decision in *Resolution Trust Corp. v. Gill*, 960 F.2d 336 (3rd Cir. 1992). Citing *National Bank*, the Third Circuit held that a levy serves merely to protect the government's interest in property until competing claims can be resolved. *Resolution*, at 343. In so holding, the court noted it's earlier decision in *United States v. Sullivan*, 333 F.2d 100, 116 (3rd Cir. 1964) no longer reliable because "clearly contrary" to this Court's decision in *National Bank* . *See Resolution*, at 343 n.8.

c. The appellate court's decision is also flatly at odds with the statutes terms. While § 2410(a) allows an action where the United States *claims*, rather than actually *has*, a lien (App., 27a), § 2410(b) expressly extends such cases to those where notices of tax lien have been filed. The first sentence in subsection (b), requiring the complaint to "set forth ... the nature *of the interest or* lien of the United States" (App., 42a), compels the conclusion that Congress intended to allow actions where the United States simply *claims* a lien, as subsection (a) explicitly states. If one is "to give effect .. to every word Congress used", *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), it is evident that the existence of an actual lien is not required to support an action under § 2410.

Because it is the time of assessment, not the filing of a notice of lien, that gives rise to a lien in favor of the United States, it follows that filing a certificate of release of

lien does not extinguish the lien as the district court found (App., 24a). And because ownership remains in the person whose property is levied upon until a notice of seizure required by § 6335(a) is given (App., 40a), it stands to reason that the United States' can only claim a lien interest where the notice has not been given.

II. 5 U.S.C. § 552a; The Privacy Act claim.

The appellate court has decided an important federal question in a way that produces an irrational result. The decision so far departs from the accepted and usual course of judicial proceedings, and sanctions such proceedings by the lower court, as to call for the exercise of this Court's power of supervision.

a. It has been found that, read together, 5 U.S.C. § 552a and 26 U.S.C. § 7852(e) clearly entitles a person to "bring a suit for failure to maintain *any* record affecting the fairness of *any* determination, except a determination as to

[that person's] tax liability." *Jenkins v. Dept. of Treasury*, 64 AFTR 2d ¶ 89-5106 (N.D.Cal. 1989) (italics in original). While it is true that §§ 6321 and 6322 (26 U.S.C.) establish a nexus between the "person liable" and the person assessed, it does not follow that the IRS makes that connection in every instance, as this case clearly indicates. Consequently, it cannot be concluded, as both the district and appellate courts concluded here, that a determination to seize property made by the IRS is equal to a claim seeking the determination of the liability. We respectfully submit that a decision as to who, if any one, is liable for taxes is not necessary in reaching a decision as to whether information contained in records used in making a determination to seize property is accurate.

b. The accepted course of judicial proceedings in statutory construction is to determine and give effect to Congressional intent. *Public Employees Retirement System v.*

Betts, 492 U.S. 158, 171 (1989). It has long been a maxim that the intent of Congress constitutes the law. *Stewart v. Kahn*, 78 U.S. 493, 504 (1870). Judicial enlargment of a statute to include that which is not within scope "transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 250 (1926).

In the absence of any "interpretative material in the committee reports of the Congress" which added § 7852(e) to the Code, "[t]he naked words of the statute then control." *Fisher Flouring Mills Co. v. U.S.*, 270 F.2d 27, 32 (9th Cir. 1958). Limiting the application of 5 U.S.C. § 552a(g) to determinations "of liability" (App., 41a) compels the conclusion that Congress' intent to exclude other determinations was deliberate. Presumably, Congress intends to do what it does. *Ceil Associates v. Nat'l Institutes, Etc.*, 579 F.2d 1155, 1159 (9th Cir. 1978).

As the Ninth Circuit itself holds, [t]ax liability is imposed by statute independant of

an administrative assessment. *United States v. Kelley*, 539 F.2d 1199, 1203 (9th Cir. 1976). Thus, whether liability for taxes under § 3403 rests with James or his employer is irrelevant. Section 6203 is a procedural statute which makes no one liable for taxes, but rather, simply provides the manner in which an assessment is to be made. The IRS either made an assessment or it didn't. If not, the records used in making the determination to seize the Fords' property are inaccurate.

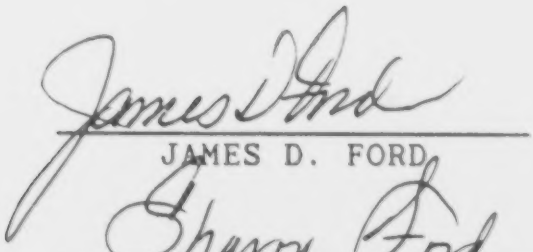
Further, petitioners claim that the records inaccurately reflect that § 6303(a) notices were sent as required prompted the IRS' own admission that such records would not have been used in relation to determining a liability since they are created after a liability determination.

We respectfully submit that the court of appeal's construction of § 7852(e) allows the IRS to maintain inaccurate, incomplete and irrelevant records for any purpose without fear of recourse or liability.

CONCLUSION

The petition for a writ of certiorari should be granted for the reasons set forth above.

Respectfully submitted,



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March 1993

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES D. FORD; SHARON A. FORD, Plaintiffs-Appellants,	)	No. 91-36319
UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, Defendant-Appellee.	)	MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

Submitted December 21, 1992**
Filed December 24, 1992
Before: TANG, NOONAN, and NELSON, Circuit Judges

James and Sharon Ford appeal pro se the district court's summary judgment in favor of the United States and the Internal Revenue

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. 34(a); 9th Cir. 34-4.

Service ("IRS") in the Fords' action challenging the assessment and collection of their income taxes for tax year 1983 and for a tax penalty for tax year 1986. We have jurisdiction pursuant to 28 U.S.C. 1291. We affirm.

The Fords failed to file a federal income tax return for tax year 1983. Following the government's notice of tax deficiency and the Fords' subsequent nonpayment, the IRS filed a federal tax lien for the liability against all of the Fords' property. It also served a notice of levy on Mr. Ford's employer. The IRS subsequently seized Mr. Ford's wages to satisfy the outstanding tax liability.

In 1986, Mr. Ford filed a W-4 in which he claimed he was exempt from tax liability. In response, the IRS sent him a letter stating that it needed more information to assess his exemption claim. After finding Mr. Ford's explanation was deficient, the IRS assessed a $500 civil penalty against him and filed a tax

lien against his property for that amount. The lien was discharged in 1988, apparently because the $500 had been collected through a levy on Mr. Ford's wages.

I

In the first two counts of their complaint, the Fords seek quiet title pursuant to 28 U.S.C. § 2410 to the money collected by the IRS for tax years 1983 and 1986. The district court dismissed both counts finding that it lacked jurisdiction to consider the Ford's quiet title claim.

We review de novo the district court's dismissal for lack of subject matter jurisdiction of a taxpayer's action against the IRS. Elias v. Connet, 908 F.2d 521, 527 (9th Cir. 1990). Under the Internal Revenue Code, no suit to recover a tax alleged to have been erroneously or illegally collected shall be maintained until a claim for a refund has been filed. 26 U.S.C. § 7422(a). This provision is

jurisdictional and failure to file a proper claim for a refund requires dismissal of the claim. See Yuen v. United States, 825 F.2d 244, 245 (9th Cir. 1987). Here, the Fords, through their quiet title action, essentially seek a refund for tax years 1983 and 1986. Because it appears, however, that the Fords have not filed a refund claim with the Secretary, the district court was without jurisdiction to hear the Fords' claim for those years. See id.

The Fords nevertheless contend that section 2410 gives the district court jurisdiction to hear their claim because they are seeking quiet title to their property rather than a refund. See 28 U.S.C. § 2410. Section 2410 states, in pertinent part: "[t]he United States may be named a party in any civil action or suit in any district court ... to quiet title to ... real or personal property on which the United States has or claims a mortgage or other lien." id. We have interpreted section 2410 as a limited waiver of

the United State's sovereign immunity in "actions challenging the procedural aspects of tax liens." Arford v. United States, 934 F.2d 229, 232 (9th Cir. 1991). Under section 2410, however, a taxpayer may not bring an action to quiet title to property on which the United States used to have a lien, but now has title. Hughes v. United States, 953 F.2d 531, 538 (9th Cir. 1992).

In their complaint, the Fords seek quiet title to the wages already seized by the IRS. They do not appear to challenge any present or continuing garnishment of Mr. Ford's wages. See Hughes, 953 F.2d at 538 (taxpayers can only use section 2410 to challenge the continued collection of taxes through the garnishment of their wages). Accordingly, the Fords' action seeking the return of funds collected through the levy on Mr.Ford's wages is barred because the government has title to the money already collected. See Hughes, 953 F.2d at 538

(claimants are barred from pursuing claims relating to previously garnished wages because the government has a title interest rather than a lien interest in such wages). Because section 2410 does not provide a waiver of sovereign immunity in this case, the district court properly dismissed the first two counts of the Fords' complaint for lack of jurisdiction. See id.[1]

II

The third count of the Fords' complaint seeks damages pursuant to the Privacy Act, 5 U.S.C. 552(a) for the IRS' alleged dissemination of inaccurate information pertaining to the

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[1] The Fords also contend that the district court had jurisdiction pursuant to the judicial review provisions of the Administrative Procedure Act ("Act") 5 U.S.C. § 702. This contention lacks merit. See Hughes, 953 F.2d at 537; Lonsdale v. United States, 919 F.2d 1440, 1444 (10th Cir. 1990) (APA does not create an independent basis for jurisdiction or waive sovereign immunity where the collection of taxes is challenged).

Fords' tax liability. The district court dismissed this count for lack of jurisdiction.

Section 552a(g)(1) provides a civil remedy for an agency's failure to comply with the Privacy Act. Under section 26 U.S.C. § 7852(e), however, the Privacy Act "shall not be applied directly or indirectly, to the determination of the existence of liability (or the amount therefor) of any person for any tax, penalty, interest, fine, forfeiture." Thus, district courts lack jurisdiction to hear Privacy Act claims regarding tax liability. See England v. Commissioner, 798 F.2d 350, 352 (9th Cir. 1986) (district court without jurisdiction over a civil action by individual who seeks to amend a record determining actual or possible liability). Here, the Fords contend that the government's determination to make a seizure of their property was based on inaccurate and inconsistent records. Because this contention involves the Fords' tax liability, the district

court correctly determined that it lacked jurisdiction to hear the Fords' Privacy Act claim. See id.

III

The Fords also seek access to IRS documents pertaining to their case under the Freedom of Information Act ("FOIA") 5 U.S.C. § 552. They contend that the IRS conducted an insufficient search for documents pertaining to their tax liability and that the IRS knowingly possessed responsive documents which should be disclosed pursuant to the Fords' FOIA request.

To prevail in a FOIA suit which alleges an inadequate search, the defendant agency must show that it has conducted a "search reasonably calculated to uncover all relevant documents." Zemansky v. United States, 767 F.2d 569, 571 (9th Cir. 1985). The key inquiry, however, is "not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those

documents was adequate." Id. To prove the adequacy of a search, agencies may rely upon declarations from agency officials. Id. at 571-72. Here, the district court properly found that the affidavits submitted by two "disclosure specialists" adequately demonstrated that the IRS made a reasonable search for the requested documents.

As to the Fords' contention that the IRS has improperly withheld responsive documents, the IRS submitted evidence that, except for four requested pages, it had released all documents within the jurisdiction of its Seattle branch office. Additionally, the IRS submitted evidence in support of summary judgment showing that the four pages which were withheld fell into one of the categories for which disclosure is prohibited. See 5 U.S.C. § 552(b)(7)(c) (exemption applies to information compiled for law enforcement purposes to the extent that production of the information would be an

unwarranted invasion of privacy). The Fords failed to raise a triable issue of fact that any exception applied which would permit disclosure of the documents under FOIA. Accordingly, the district court properly granted summary judgment for the United States of the FOIA claims. See Celotex Corp. v. Cattrett, 477 U.S. 317, 324 (1986).

IV

On appeal, the Fords' also raise several evidentiary challenges to the admissibility of various governmental forms and correspondence. Evidentiary decisions "are viewed for abuse of discretion and will not be reversed absent prejudice." Roberts v. College of the Desert, 870 F.2d 1411, 1418 (9th Cir. 1988).

First, the IRS forms at issue in this case are admissible as self-authenticating public documents under Fed. R. Evid. 902(1) and 803(8). See Hughes v. US, 953 F.2d at 539. Moreover, even had the district court abused its

discretion by considering the government's evidentiary material, the Fords have failed to demonstrate prejudice; they have failed to show that the district Court's conclusion that it lacked jurisdiction to hear their refund action would have differed had the court found the government's evidence inadmissible.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES D. FORD, et ux, Plaintiffs, UNITED STATES OF AMERICA et al., Defendants.	NO. C90-5492TR ORDER DENYING PLAINTIFFS' MOTION TO STRIKE; GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT; AND STRIKING PLAINTIFFS MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND FOR JUDICIAL NOTICE

THIS MATTER comes before the court on five motions: (1) plaintiffs' motion to strike the declaration of R. Scott Clarke and attached exhibits; (2) defendant United States' motion for partial summary judgment; (3) defendant Internal Revenue Service's motion for partial summary judgment; (4) plaintiffs' motion for partial summary judgment; and (5) plaintiffs' motion to take judicial notice of certain

Internal Revenue Service record-keeping regulations. Having reviewed the motions, together with all documents in support and in opposition, and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

For the 1983 tax year, plaintiffs did not file a tax return. The Internal Revenue Service computed plaintiffs' liability for tax, interest, and penalties based on information received from taxpayers. There is evidence that the Internal Revenue Service sent plaintiffs notice of the deficiency. See Declaration of R. Scott Clarke, exhibit 19, Certificate of Assessments and Payments of James D. Ford. Plaintiffs did not contest the deficiency in Tax Court.

There is evidence that the Service sent plaintiffs notice and demand for payment. See Id. The Service filed a federal tax lien for the amount of the liability, and served notice

of levy on plaintiff James D. Ford's employer. See Complaint, paragraphs 15 and 41.

For the 1986 tax year, plaintiff James D. Ford filed a form W-4 with his employer, claiming exemption from withholding taxes. There is evidence that the Internal Revenue Service assessed a civil penalty and sent a balance due notice. See Declaration of R. Scott Clarke, exhibit 4, W-4 form of James D. Ford. The Service filed a federal tax lien, which eventually was released on March 9, 1988. See Declaration of R. Scott Clarke, exhibit 14, Certificate of Release of Federal Tax Lien.

Plaintiffs filed this action pro se against the United States, the Department of Treasury, and the Internal Revenue Service. They assert that defendants: (1) illegally seized their personal property (counts I and II); (2) violated the Privacy Act (count III); and denied them access to information (counts IV and V). Plaintiffs seek an injunction; money damages;

and return of the property they claim was illegally seized.

Plaintiffs now move to strike the declaration of R. Scott Clarke and attached exhibits. Defendants United States and Internal Revenue Service move for partial summary judgment. Plaintiffs move for partial summary judgment on counts I, II, and III. Plaintiffs move that the court take judicial notice of regulations pertaining to the Internal Revenue Service System of Records, published at 50 Fed. Reg. 29821 and 29858.

II. DISCUSSION

A. Plaintiffs' motion to strike declaration of R. Scott Clarke and attached exhibits

Plaintiffs move to strike the declaration of R. Scott Clarke and attached exhibits on grounds that: (1) Clarke did not make a sufficient showing of personal knowledge of the authenticity of the documents contained in the exhibits; (2) the documents contained in the

exhibits are not authenticated as required under 28 U.S.C. § 1733 and Fed. R. Civ. P. 44; (3) the government's Certificate of Assessments and Payments is inadmissible under Federal Rule Evidence 902(1); and (4) the Certificate of Assessments and Payments is inadmissible under Federal Rules of Evidence 803(6) and 803(8).

As a preliminary matter, the court recognizes that defendant failed to timely serve plaintiffs with its opposition to plaintiffs' motion to strike. As a result, plaintiffs' reply memorandum is untimely. However, the reply memorandum was filed before the court ruled on the motion to strike. In reaching its decision, the court has given full consideration to plaintiffs' reply memorandum.

1. Personal knowledge of R. Scott Clarke

Plaintiffs argue that the declaration should be stricken because Clarke makes no showing that he has personal knowledge that the exhibits are true and correct copies and are

maintained in the Internal Revenue Service administrative files.

An affidavit on motion for summary judgment must be made on personal knowledge, set forth facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. See Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250, 1255 (9th Cir. 1982). Clarke states in the declaration that he is the Department of Justice trial attorney with primary litigation responsibility in this case. See Declaration of R. Scott Clarke, paragraph 1. He states that in connection with his responsibilities as trial attorney, he is in possession of the Internal Revenue Service administrative files for James D. Ford for 1983 and 1986 and the Department of Justice file relating to plaintiffs' previous litigation. See Declaration of R. Scott Clarke, paragraphs 2 and 3. The court is satisfied that R. Scott Clarke has sufficient personal

knowledge to support his declaration as to the authenticity of the contents of the files.

2. Admissibility under 28 U.S.C. § 1733 and Fed. R. Civ. P. 44

Plaintiffs argue that the declaration and accompanying exhibits are inadmissible under 28 U.S.C. § 1733.

Section 1733 does not control in cases in which the Federal Rules of Evidence apply. 28 U.S.C. § 1733(c). The Federal Rules apply in this case. Section 1733 therefore does not control.

Plaintiffs argue that the Certificate of Assessments and Payments (form 4340) and Certificate of Official Record (form 2866) are inadmissible under Federal Rule of Civil Procedure 44.[1/]

[1/] Rule 44 provides that "[a]n official record kept within the United States ... when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record, or by the officer's deputy, and accompanies by a certificate that such officer has the custody."

The officer having legal custody of the Certificate of Assessments and Payments is Patsy McFarland. See Declaration of Janet T. Boyer, paragraph 8. Ms. McFarland signed the account transcripts showing payments and other entries and the official certification for the form 4340 Certificate for Robert E. Wenzel, Director of the Ogden Service Center. See Declaration of R. Scott Clarke, exhibit 19, Certificate of Assessments and Payments. There is unrefuted evidence that Ms. McFarland is the Supervisor of the Installment/Transcript/Erroneous Refund Unit, and is authorized to certify the documents. See Declaration of Janet T. Boyer, paragraphs 4 and 8. The court rejects plaintiffs assertions that Patsy McFarland lacked authority to certify the Certificate of Assessments and Payments, and that she falsely certified the form.

The court finds that the declaration and accompanying documents are properly certified

and therefore admissible under Fed.R.Civ. P. 44.

3. Federal Rule of Evidence 902

Plaintiffs argue that the Certificate of Assessments and Payments is inadmissible under Federal Rule of Evidence 902.[1]/ The Certificate of Assessments and Payments bears the signature of Robert E. Wenzel, Director of the Internal Revenue Service Center at Ogden, Utah, by Patsy L. McFarland. See Declaration of R. Scott Clarke, exhibit 19, Certificate of Payments and Assessments. The Certificate is accompanied by a Certificate of Official Record signed by Robert E. Wenzel under seal, certifying that the Certificate of Assessments and Payments was authentic and signed in the directors official capacity. See id. The court

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[1]/ Rule 902(2) provides that an unsealed document purporting to bear the signature in the official capacity of an officer or employee of a United States agency is admissible without extrinsic evidence of authenticity if a public officer certifies under seal that the signature on the document is authentic and was made in the officer's official capacity.

finds the Certificate admissible pursuant to Rule 902.

4. Federal Rules of Evidence 803 and 1006

Plaintiffs argue that the Certificate of Assessments and Payments is not admissible under Federal Rules of Evidence 803(6); 803(8); 1006.

The court rejects plaintiffs' arguments. See Fed. R. Evid. 803(8) (hearsay exclusion does not apply to records, reports, statements, or data compilations of public offices or agencies, setting forth activities of the office or agency or matters observed pursuant to duty imposed by law). The Certificate of Assessments and Payments is a data compilation of a public agency, which pursuant to Rule 803(8) is not excluded by the hearsay rule.

Rule 1006 is inapplicable. The Certificate of Assessments and Payments is a certified, self-authenticating public record, not a summary.

Plaintiffs' motion to strike is denied.

B. Defendant United States' motion for partial summary judgment

Defendant United States moves for summary judgment on Counts I and II on the ground that the court lacks jurisdiction.

The court will grant summary judgment only if the evidence, when viewed in the light most favorable to the nonmoving party, reveals no genuine issue of material fact for trial, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(b); Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

1. Count I

In count I, the Fords allege that the United States illegally seized $500 in cash claimed to be a civil penalty for the year ending in 1986. The Fords assert that collection of the $500 was illegal because the United States failed to : (1) formally assess the penalty; (2) issue and mail notice of assessment & demand for payment; (3) issue

notice of intent to levy; and (4) submit authorization documents to the collection division.

The United States may be sued only to the extent that it has waived sovereign immunity. United States v. Sherwood, 312 U.S. 584, 586 (1941). This court has subject matter jurisdiction for "any civil matter arising under any Act of Congress providing for internal revenue." 28 U.S.C. § 1340. However, "this grant of jurisdiction does not ... constitute a waiver of sovereign immunity by the United States." Aqua Bar & Lounge, Inc. v. United States, 539 F.2d 935, 937 (3rd Cir. 1976).

Plaintiffs bring this action pursuant to 28 U.S.C. § 2410. This statute waives the sovereign immunity of the United States in actions to quiet title to real or personal property on which the United States has or claims a mortgage or other lien. In order to qualify for the waiver, the complaint must "set

forth with particularity the nature of the interest or lien of the United States." 28 U.S.C. § 2410(b). Plaintiffs do not allege that the United States has a lien on the disputed money. There is evidence that the United States in fact has outright ownership and possession of the money. See Declaration of R. Scott Clarke, exhibit 14, Certificate of Release of Federal Tax Lien. The tax lien was released on March 9, 1988. See id. Because the claim does not involve a lien, section 2410 cannot be relied upon by plaintiffs as a waiver of sovereign immunity.

Plaintiffs assert that the Administrative Procedure Act, 5 U.S.C. §§ 701-06, confers jurisdiction and waives sovereign immunity. However, the Act does not create an independent basis for jurisdiction or waive sovereign immunity where collection of taxes is challenged. See Lonsdale v. United States, 919 F.2d 1440, 1444 (10th Cir. 1990).

In order to maintain a lawsuit to recover an allegedly illegally collected tax penalty, plaintiffs must first file a claim for refund or credit with the Secretary of the Internal Revenue Service. 26 U.S.C. § 7422(a). The requirement is jurisdictional, and failure to file a proper claim for refund requires dismissal. Yuen v. United States, 825 F.2d 244, 245 (9th Cir. 1987). Plaintiffs do not allege that they filed such a claim. The court therefore finds that jurisdiction is lacking.

2. Count II

In count II the Fords claim that the United States illegally seized $23,402.59 in federal taxes, interest, and penalties for the year ending in 1983. The Fords assert that collection of the money was illegal because the United States failed to : (1) formally assess the taxes and penalties; (2) issue and mail notice of assessment and demand for payment; (3) issue notice of intent to levy; and (4) submit

authorization documents to the collection division.

Plaintiffs assert a waiver of sovereign immunity pursuant to 28 U.S.C. § 2410. There is evidence that the United States has a lien for taxes for the 1983 tax year. However, there is no specific property for which plaintiffs seek a quiet title decree. Plaintiffs seek to recover Mr. Ford's wages, which were seized pursuant to a levy on the tax lien. The United States has outright ownership and possession of this money. Section 2410 does not authorize a lawsuit for recovery of property in the possession of the United States and over which the United States claims title. Bank of Hemet v. United States, 643 F.2d 661, 665 n.1 (9th Cir. 1981). Section 2410 is applicable only where plaintiff seeks to have title quieted. Since count II is not a claim to quiet title, sovereign immunity is not waived pursuant to section 2410. Jurisdiction over count II

therefore is lacking.

C. Defendant Internal Revenue Service's partial summary judgment

The Internal Revenue Service moves for summary judgment on Counts III, IV, and V of plaintiffs' complaint.[1]/

1 Count III

In count III, plaintiffs assert that the Internal Revenue Service maintained inaccurate records pertaining to plaintiffs' tax liability, and thereby violated the Privacy Act of 1974, 5 U.S.C. § 552a.[2]/ Defendant argues that the

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[1]/ Plaintiffs name the Department of the Treasury and the Internal Revenue Service as defendants. It is not clear whether plaintiffs name the Department of the Treasury as a separate defendant from the Internal Revenue Service, or as an affiliate of the Internal Revenue Service. If plaintiffs intend to name the Department of the Treasury separately, it is an improperly named defendant, and no action will lie against it. The court therefore will treat plaintiffs' claim in counts III, IV, and V as claims against the Internal Revenue Service.

[2]/ Section 552a(e)(5) provides that every agency that maintains a system of records shall

court lacks subject matter jurisdiction.

Section 552a(g)(1) provides a civil remedy for an agency's failure to comply with the Privacy Act.[1]/ However, subsection 552a(g)

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cont., "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination."

Section 552a(e)(6) provides that every agency that maintains a system of records shall "prior to disseminating any record about an individual to any person other than an agency ... make reasonable efforts to assure that such records are accurate, complete, timely and relevant for agency purposes."

[1]/ 5 U.S.C. § 552(g)(1) provides that when an agency:

C. fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness ...; or

D. fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency and the district courts shall have jurisdiction in the matters under the provisions of this subsection.

shall not be applied to the determination of the existence or possible existence of tax liability. See 26 U.S.C. § 7852(e). See also England v. Commissioner, 798 F.2d 350, 352 (9th Cir. 1986) (district court without jurisdiction over civil action by individual seeking to amend record determining actual or possible tax liability). Since plaintiffs' Privacy Act claim involves records pertaining to the determination of plaintiffs tax liability, 26 U.S.C. § 7852(e) precludes jurisdiction. The court rejects plaintiffs' argument that the statute precludes jurisdiction only in lawsuits seeking to amend records.

Defendant's motion for summary judgment with respect to Count III is hereby granted.

2. Counts IV and V

In Counts IV and V, plaintiffs seek access to information pursuant to the Freedom of

Information Act, 5 U.S.C. 552(a). Defendant argues that it is entitled to judgment in its favor because "each document in existence which Information Act, 5 U.S.C. 552(a). Defendanthas been requested either has been produced, is unidentifiable, or is wholly exempt under the Act. See Marks v. United States (Dept. of Justice), 578 F.2d 261, 262 (9th Cir. 1978).

a. Adequacy of search

The agency is under a duty to conduct a reasonable search for responsive records. Zemansky v. United States E.P.A., 767 F.2d 569, 571 (9th Cir. 1985. To prove the adequacy of a search, the agency may rely on declarations from the agency officials. See id. Defendant submits declarations of Stephen Flesner, Disclosure Officer for the Seattle District Office of the Internal Revenue Service. Upon consideration of these declarations, the court is satisfied that the agency's search for responsive documents was adequate. See id.

(possible existence of other responsive documents not dispositive of whether search was adequate).

b. Exemption under the Act

Defendant claims that four pages of documents were properly withheld from plaintiffs pursuant to an exemption under the Freedom of Information Act. See 5 U.S.C. §552 (b)(7)(C) (exempting information compiled for law enforcement purposes to extent production of the information could reasonably be expected to constitute unwarranted invasion of personal privacy); Index of Documents, documents #7, 14, 67, and 69. A document is properly withheld under the exemption if the public interest in disclosure is outweighed by the individual privacy interest that would suffer from disclosure. Wiener v. Federal Bureau of Investigation, No. 88-5867, 1991 WL 124586, slip op. at 6 (9th Cir. July 12, 1991) (citing Department of Justice v. Reporters Committee for

Freedom of the Press, 489 U.S. 749, 109 S.Ct. 1468, 1476 & 1483 (1989).

Documents 7, 67, and 69 are handwritten notes of Internal Revenue Service personnel made in connection with the Ford's tax liability and an incident in which a Revenue Officer possibly was followed by plaintiffs. Document 14 is a statement regarding plaintiffs' tax liability. See Declaration of Sharon A. Ford, exhibit 8, page 3. The withheld portions of these documents identify the individual IRS employees who prepared the documents. Defendant argues that release of the information would tend to invade the personal privacy of Internal Revenue Service enforcement personnel and other third parties.

The court finds that public interest in disclosure of the information is minimal. See Department of Justice v. Reporters Committee, 109 S.Ct. at 1482 (1989) (public interest is in shedding light on agency's performance of its

duties; deletion of names identifying individuals is appropriate); Stauss v. Internal Revenue Service, 516 F.Supp. 1218, 1222 (Dist. D.C. 1981) (plaintiff failed to allege that public interest would be served by disclosure of identities of IRS employees). Further, the court finds that release of the names could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Defendant's motion for partial summary judgment therefore is granted.

D. Plaintiffs' motion for partial summary judgment

In light of the court's rulings in favor of the United States and Internal Revenue Service on their motions for partial summary judgment, the court strikes as moot plaintiffs' motion for partial summary judgment.

E. Plaintiffs' motion to take judicial notice

In light of the court's rulings in favor of the United States and Internal Revenue Service

on their motions for partial summary judgment, the court strikes as moot plaintiffs' motion to take judicial notice.

Now, therefore, plaintiffs' motion to strike the declaration of R. Scott Clarke and attached exhibits is DENIED. Defendant United States' motion for partial summary judgment is GRANTED. Defendant Internal Revenue Service's motion for partial summary judgment is GRANTED. Plaintiffs' motion for partial summary judgment is STRICKEN AS MOOT. Plaintiffs' motion for judicial notice is STRICKEN AS MOOT.

DATED at Seattle, Washington this 17th day of October, 1991.

BARBARA J. ROTHSTEIN
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

5 U.S.C. § 552a(g)(1) Civil Remedies- Whenever any agency

* * * * *

> (C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefit to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual;

* * * * *

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

5 U.S.C. § 552a(g)(4)

In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of-

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000;

(B) the costs of the action together with reasonable attorney fees determined by the court.

26 U.S.C. § 3403. Liability for tax.

The employer shall be liable for the payment of the tax required to be deducted and withheld under this subchapter, and shall not be liable to any person for the amount of any such payment.

26 U.S.C. § 6155. Payment on notice and demand.

(a) General rule.

Upon receipt of notice and demand from the Secretary, there shall be paid at the place and time stated in such notice the amount of any tax ... stated in such notice and demand.

26 U.S.C. § 6201. Assessment authority.

The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes ... imposed by this title ... . ***

26 U.S.C. § 6203. Method of assessment.

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Seccretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment..

26 U.S.C. § 6321. Lien for taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, of assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real of personal, belonging to such person.

26 U.S.C. § 6303. Notice and demand for tax.

(a) General rule.

Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business

of such person, or shall be sent by mail to such person's last known address.

26 U.S.C. § 6322. Period of lien.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

26 U.S.C. § 6331. Levy and distraint.

(a) Authority of Secretary.

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax ... by levy upon all property and rights to property ... belonging to such person or on which there

is a lien provided in this chapter for the payment of such tax. ***

26 U.S.C. § 6335. Sale of seized property.

(a) Notice of seizure.

As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

26 U.S.C. 6502. Collection after assessment.

* * * * *

(b) Date when levy is considered made.

The date on which a levy on property or right to property is made shall be the date on which the notice of seizure in section 6335(a) is given.

26 U.S.C. § 7852 Other applicable rules.

* * * * *

(e) Privacy Act of 1974.

The provisions of subsections (d)(2),(3), and (4), and (g) of section 552a of title 5, United States Code, shall not be applied, directly or indirectly, to the determination of the existence or possible existence of liability (or the amount thereof) of any person for any tax, penalty, interest, fine, forfeiture, or other imposition or offense to which the provisions of this title apply.

28 U.S.C. § 2410. Actions affecting property on which United States has lien.

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter-

(1) to quiet title to,

* * * * *

real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which

filed the notice, and the date and place such notice of lien was filed.

* * * * *